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CLERK U.S. DISTRICT COURT WESTERN DISTRICT OF WASHINGTON AT TACOMA		
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CV 01 00263 #00000137

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MICHAEL A JACKSON,

Plaintiff,

v.

BRIAN GAIN, *et al* ,

Defendants

Case No C01-0263FBD

REPORT AND
RECOMMENDATION

This § 1983 Civil Rights matter has been referred to the undersigned Magistrate Judge pursuant to Title 28 U S C §§ 636(b)(1)(A) and 636(b)(1)(B) and Local Magistrates' Rules MJR 1, MJR 3, and MJR 4. Before the Court is Defendants' Motion for Summary Judgment (Dkt # 136). Plaintiff has not responded to the motion, despite being repeatedly informed of the Summary Judgment standard (Dkt # 24, General Order), (Dkt # 47, Order Directing Service).

Local Rule 7(b)(2) indicates

Obligation of Opponent Each party opposing the motion shall, within the time prescribed in CR 7 (d), file with the clerk, and serve on each party that has appeared in the action, a brief in opposition to the motion, together with any supporting material of the type described in section (1) If a party fails to file papers in opposition to a motion, such failure may be considered by the court as an admission that the motion has merit

1 Local rule 7(b)(2) (emphasis added)

2 Given Plaintiffs' failure to respond, the Court considers the facts as set forth by the Defendants to
3 be uncontested. For the reasons set forth below the undersigned recommends that the Defendant's Motion
4 be **GRANTED** and this action **DISMISSED WITH PREJUDICE**.

5 FACTS

6 Plaintiff is an inmate serving a sentence with the Department of Corrections for the State of
7 Washington. On March 27th, 2001 between 8 30 and 9 00 A M Correctional Officer Lawrence Turner
8 was performing morning inspections (Dkt # 136 page 3). As part of the inspection he was checking to
9 see each inmates bed was made. Washington Corrections Center rules mandate that inmates make their
10 beds by 8 00 A M everyday except laundry day. It is a minor infraction for an inmate to be in bed under
11 the covers during programing hours unless the inmate has a medical lay-in or works as a night porter
12 (Dkt # 136 page 3). When Officer Turner reached plaintiff's cell plaintiff was in bed with his sheet and
13 blanket pulled over his head (Dkt # 136 page 3).

14 It is undisputed that Officer Turner entered plaintiff's cell. Plaintiff claims that Officer Turner hit
15 him in the right arm with a closed fist, and Officer Turner alleges he called plaintiff's name and plaintiff
16 woke up. It is undisputed that no injuries were suffered (Dkt # 136 page 3).

17 Plaintiff reported the alleged assault to unit staff and the incident was investigated by Sergeant
18 Ricker. Plaintiff then filed a grievance which was investigated by Nancy Davies. No misconduct was
19 found to have occurred (Dkt # 136 page 4).

20 On March 30th, 2001 a classification committee met regarding plaintiff. The committee met
21 because of concern over plaintiff's mental health, his refusal to take medications, his institutional history,
22 and his crime (Dkt # 136 exhibit 7). The committee viewed plaintiff as "a seriously mentally ill inmate
23 who is showing signs of decompensating, is not medication compliant, and who now needs to be closely
24 monitored for more advanced signs of deterioration, such as self harm" (Dkt # 136 exhibit 7 attachment
25 A). Mental health professions noted implacable, paranoia, with a pressured effect and angry mood. They
26 noted that plaintiff had focused on two Officers in Cedar Hall and was exhibiting bizarre behavior (Dkt
27 # 136 exhibit 7 attachment A).

28 A decision to transfer plaintiff to a level 4 facility with a mental health unit was made and it was

1 decided plaintiff should be placed in Administrative segregation pending transfer (Dkt # 136 exhibit 7
2 attachment A)

3 On April 5th, plaintiff was called to Sergeant Ricker's office and told he was being placed on
4 Administrative Segregation status Plaintiff attempted to run from the Office and was taken to the ground
5 by two unnamed correctional officers (Dkt # 136 page 5)

6 Plaintiff brings this action naming Officer Turner for hitting him in the arm, Sergeant Ricker for
7 the use of force on April 5th, and he names five other persons who played a part in the decision to transfer
8 him which he depicts as retaliatory (Dkt # 60)

9 DISCUSSION

10 A The Standard

11 Summary judgment is proper only where "the pleadings, depositions, answers to interrogatories,
12 and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any
13 material fact and that the moving party is entitled to judgment as a matter of law " Fed R Civ P 56(c)
14 The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial
15 Anderson v Liberty Lobby, Inc , 477 U S 242, 257 (1986) Mere disagreement or the bald assertion that
16 a genuine issue of material fact exists no longer precludes the use of summary judgment California
17 Architectural Building Products, Inc v Franciscan Ceramics, Inc , 818 F 2d 1466, 1468 (9th Cir 1987),
18 *cert denied*, 484 U S 1006 (1988)

19 B Officer Turner

20 The Eighth Amendment to the United States Constitution prohibits cruel and unusual punishment
21 A viable Eighth Amendment claim has an objective and subjective component Farmer v Brennan, 511 U S
22 825, 834 (1994) The objective component requires that the pain be 503
23 U S 1, 8-9 (1992), and the subjective component requires that the defendant act with deliberate indifference
24 to an inmate's health or safety Wilson v Seiter, 501 U S 294, 302-03 (1991) A de minimis physical injury is
25 not sufficient to support a claim Siglar v Hightower, 112 F 3d 191, 193 (5th Cir 1997)

26 Here, it is undisputed that plaintiff suffered no physical injury (Dkt # 136 exhibit 6 attachment B
27 page 13) Even assuming his facts to be true he has failed to show that the contact was objectively sufficiently
28 serious to state a claim Defendant Turner is entitled to Summary Judgment

1 C Sergeant Ricker

2 On April 5th plaintiff was informed he was being taken to segregation He was in Sergeant Ricker's
 3 office at the time and he attempted to run from the office (Dkt # 136 exhibit 6 attachment B page 19) Two
 4 Officers took him to the ground and in the process he alleges that he struck his head The alleged injury may
 5 or may not be sufficiently serious to state a claim, but, plaintiff has failed to come forward with any evidence
 6 that the named defendant harbored an improper motive or intent Force applied in good faith to control an
 7 unruly inmate does not violate the Eighth Amendment even the amount of force used appears excessive in
 8 hind sight To establish a violation of the Eighth Amendment, the offending conduct must reflect an
 9 unnecessary and wanton infliction of pain Whitley v. Albers, 475 U S 312, 319 (1986)

10 Plaintiff's complete failure to come forward with any evidence that the force was applied for an
 11 improper purpose mandates Summary Judgement for this defendant

12 D The remaining defendants.

13 The remaining five defendants are named because of there decision to transfer plaintiff to a level 4
 14 facility with a mental health unit As outlined above the stated reason for the transfer was concern over
 15 plaintiffs mental state, his refusal to take medications, his behavior, and criminal history A decision that
 16 furthers a legitimate penological goal cannot be depicted as retaliatory To state a claim for retaliation, a
 17 plaintiff "must allege both that the type of activity he engaged in was protected under constitution and that
 18 the state impermissibly infringed upon his right to engage in the protected activity " Rizzo v Dawson,
 19 778 F 2d 527, 531 (9th Cir 1985) An inmate must show that he or she was retaliated against for
 20 exercising constitutional rights and that the retaliatory action did not advance legitimate penological goals,
 21 such as preserving institutional order and discipline Barnett v Centoni, 31 F 3d 813, 186 (9th Cir 1994)

22 The decision to transfer plaintiff furthered legitimate goals It is undisputed that he was medically
 23 noncompliant and that staff were concerned about his mental health Transfer to a facility with a mental
 24 health unit thus furthered legitimate goals The remaining defendants are entitled to Summary Judgement in
 25 their favor

26 CONCLUSION

27 Plaintiff has failed to come forward with evidence to support his claims against the named
 28 defendants The first alleged use of force was de minimus and the second constitutional in light of

1 plaintiff's behavior. The decision to transfer him furthered legitimate penological goals and cannot be
2 depicted as retaliation. Accordingly, Defendants are entitled to Summary Judgment and this action
3 should be **DISMISSED WITH PREJUDICE**. A proposed order accompanies this Report and
4 Recommendation.

5 DATED this 2 day of May, 2002



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7 J. Kelley Arnold
8 United States Magistrate Judge
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

CHAMBERS OF
J KELLEY ARNOLD
UNITED STATES MAGISTRATE JUDGE

U S COURTHOUSE
1717 PACIFIC AVENUE
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May2, 2002

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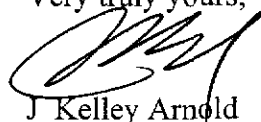
Re Jackson v Gain
Case No C01-263FDB

Dear Sir/Counsel

Enclosed are copies of my Report and Recommendation in the above-captioned case. The originals are being filed with the Clerk. This Report and Recommendation is not an appealable order. Any notice of appeal should not be filed until the District Judge enters judgment in this case.

Objections to the recommendation should be filed and served within **fourteen (14) days** of the date of this letter with copies to the Clerk for forwarding to the District Judge and to my office. Failure to file objections within the specified time waives the right to appeal any order by the District Court adopting this report and recommendation. In accordance with our local rules, you should note your objections for consideration on the Judge's motion calendar for the third Friday after they are filed. If no timely objections are filed, the matter will be ready for consideration by the District Judge on May 17th, 2002.

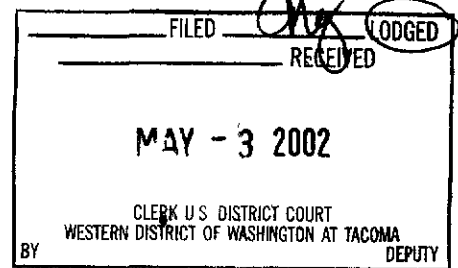
Very truly yours,



J Kelley Arnold
United States Magistrate Judge

Enclosures

cc Court File C01-263FDB



UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MICHAEL A JACKSON,
Plaintiff,

v.

BRIAN GAIN, *et al* ,
Defendants.

Case No C01-0263FDB

ORDER ADOPTING REPORT
AND RECOMMENDATION

The Court, having reviewed Defendant's Motion for Summary Judgment, the Report and Recommendation of Judge J Kelley Arnold, United States Magistrate Judge, and the remaining record, does hereby find and ORDER

- (1) The Court adopts the Report and Recommendation,
- (2) Defendant's Motion for Summary Judgement is **GRANTED**. This action is **DISMISSED WITH PREJUDICE**.
- (3) The Clerk is directed to send copies of this Order to plaintiff and to Judge J Kelley Arnold

DATED this _____ day of _____, 2002

Franklin D Burgess
United States District Judge